

# INFORMATION

F O R

Collonel John Buchan

A G A I N S T

Mr. James Smith, and Patrick Steill,

**C**OLLONEL Buchan being obliged to go abroad in the year 1694, to attend his Majesties Service, he left a Factory with *Alexander Buchan* Merchant in *Edinburgh*, for managing his Affairs in *Scotland*, and gave into him in ready Cash, 10000 Merks Scots, to be given out upon good Security to be taken in the Collonels name.

After the Collonel was abroad *Alexander Buchan* writes to him, and sends him stated and subscribed Accompts of his money, and among the rest, shoves him that he had lent 1000 merks of his money to *Patrick Steel*, and another 1000 merks to *James Hamiltoun* Elder and Younger of *Nunware*.

*Alexander Buchan* having deceased before the Collonel cleared Accompts with him, the Collonel did Immediately cause intent process before the Commissars of *Edinburgh* against the Representatives of *Alexander Buchan*, *Patrick Steil* and *James Hamilton*, for declaring the summs contained in their saids Bonds to belong to the Collonel, and to be a part of the money intrusted be him, to the said *Alexander Buchan*, conform to his Missive Letters, and stated accompts, produced in process, and after a contentious debate, before the Commissars, the money is found to belong to the Collonel, and *Patrick Steil* and *James Hamilton*, accordingly decerned to make payment thereof to him, and the Bonds ordained to be given up, the Collonel finding Caution to make the saids summs furthcoming to *Alexander Buchans* Creditors, compearing in that Process, in case it should be found they had any interest therein.

The Collonel having accordingly found Caution, and Extracted his Decreet, *James Hamilton* and *Patrick Steil* presented a Bill of Suspension, At discussing whereof compearance is made for Mr: *James Smith* of *VVhitehill*, and alleadged that *Alexander Buchan* by his Backbond granted in favours of the decaist *James Smith* Secretary to the Earl of *Pearth*, does declare, that his name was only borrowed to the two bonds charged upon, in Trust, and obliged himself to denude, in favours of the said *James Smith*; And now the said Mr, *James Smith* being Executor decerned to the said *James*, and as having Licence to pursue, contended, that he had the only Right to the saids two bonds, And the Debtors therein ought to be decerned to make payment to him; Especially, seeing he was neither called, nor compearing in the Decreet before the Commissars, and that the bond granted by *James Hamilton* is prior in date to *Alexander Buchans* receipt of the money to the Collonel; And consequently the money lent, could not belong to him. 2do: The Collonel by his Decreet is only come in place of *Alexander Buchan*, and if he were compearing, his backbond would make Mr. *Smith* preferable to him, and consequently it must have the same effect as to the Collonel.

To which it was Answered, 1mo. That the Collonel having obtained a Decreet before the Commissars, not only against the Representatives of *Alexander Buchan*, but likeways against the Debtors themselves, and whereupon they were charged with Horning, the same must be also effectual to him



him, as if *Alexander Buchan* had assigned the saids Bonds to him. In which Cases, If he had intimated the Assignment first, he would certainly have been preferable to *Mr. Smith*, who had done no Diligence upon his Backbond; And he positively contends, that he is in *pari casu*, as if he had been an Assignee, for the Backbond being granted in favours of *Smith*, is only a personal Obligation affecting the Granter and his Heirs, but can make no Real Right to the Bonds themselves, unless some Diligence had been done thereupon, which is not pretended: And the Collonel having compleated his Diligence by a Decreet, by which he is declared to have the only Right to the Bonds in contraversies, the same operates also much in his Favours, as if he had been an Assignee by *Alexander Buchan*.

2do. It is of no import to allege that *Mr. Smith* is not called in the Collonels Decreet, whom the Coll: was not bound to know, all he was obliged to call, being the Representatives of *Alexander Buchan*, & the Debtors in the Bonds, and which is done. And 2do. It is of also little import to allege, that *James Hamilton's* Bond is of a date prior to *Alexander Buchan's* Receipt of the Col: Money, because there are but two dayes at most of difference, & the Bond might then have been Written, & the Money not told till some time thereafter, but whatever be in that by the Decreet, it is found that *Alexander Buchan* by his Missive Letters, and Stated Accompts, states the Money contained in that Bond, as appertaining to the Collonel, whereupon he has compleated a Right thereto by his Decreet, before any Diligence done by *Smith*. 3tio. It is a mistake to pretend, That the Collonel is come in place of *Alexander Buchan*, and thereby is liable for implementing *Alexander Buchan's* Backbond to *Smith*, as *Alexander* himself would have been, for really and truly, the Collonel is only come in his own place again by having it, declared that a part of that Money he entrusted *Alexander Buchan* with, was lent to *James Hamilton* and *Patrick Steil* upon his accompt, and that therefore they ought to make payment thereof to him. But 3tio. It is an absurd Topick to pretend that every Man that comes in place of another, is bound to implement his deeds and which merits no answer, for thereby all conveyances would be evacuated, and all Commerce destroyed.

And the Lords are intreated to consider the Collonels circumstances in this Matter, who having given in a full Trust to *Alexander Buchan* and being himself abroad *rei publicae causa* attending his Majesties Service, no clandestine latent deed done by *Alexander* in prejudice of the Collonels Trust can operate against him, especially where nothing followed upon that Deed, nor never heard of till now that it is brought in to sham the Collonel out of his Money. 2do. *Alexander Buchan* will yet be Debtor to the Collonel in upwards of 9000 Merks besides the contraverted Bonds, and whereof the Collonel has but small hopes of Payment. 3tio. This very Backband produced by *Smith* is clogged with a provision, which the Lords are intreated to read and consider and till that provision be implemented, *Smith* can pretend no Right to the Backband, and which *Mr. Smith* neither can nor will Implement.

Compensat<sup>n</sup> There is likewise Comparance for *Patrick Steill*, who pretends he cannot be liable in Payment to the Collonel, because whoever be found to have Right to his Band, yet *Alexander Buchan* being Debtor to him in several Sums, which he has now liquidated against his representatives before the Commissars of *Edinburgh*, he must have retention thereof *pro tanto* in his own hand.

It was Answered for the Collonel, that this reason of Suspension resolves plainly in a compensation, whereupon *Mr. Steil* cannot be heard. Because, 1mo: The same defence is proponed in the Collonels decreet before the Commissars: And most justly Repelled, because *Mr. Steils* debt was not then liquidated. 2do: No compensations are proponable in the second instance, especially where the same was Repelled in the first. 3tio: All compensations ought to be *inter easdem personas*; And if *Mr. Steil* craves the benefite of compensation, he must propone it as Creditor to Collonel *Buchan*, in whole person his bond is stated, by the foresaid Decreet, which when he does he shall have an Answer.

In Respect whereof, The Letters ought to be found Orderly proceeded, and *Mr. Smith* allowed to insist against the Representatives of *Alexander Buchan*.

The Lords are intreated to Consider the Collonels Deed which is not in absence but after many Solemne Interlocutors in Presence of the four Commissars who Lord *Whythill* was one And all persons who were then known to have interest called & comparing As the said Decreet in it self will instruct.